



Federal Communications Commission
Washington, D.C. 20554

June 18, 2009

In Reply Refer to:
1800B3-MFW

Barry A. Friedman, Esq.
Thompson Hine LLP
Suite 800
1920 N Street, N.W.
Washington, DC 20036

In re: **DKJME(AM), Fountain, CO**
Facility ID No. 135886

File No. BL-20080801BCY
Request for Special Temporary
Authorization (BSTA-20081211AAA)

Petition for Reconsideration

Dear Mr. Friedman:

This letter concerns: (1) the referenced application (the "Application") of Timothy C. Cutforth ("Cutforth") for license to cover the construction permit¹ for a new directional AM station DKJME(AM) in Fountain, Colorado; and (2) the December 11, 2008, request for special temporary authorization (the "STA Request") to resume operations for the purpose of completing antenna proofs. By letter dated February 19, 2009, the staff, *inter alia*, dismissed the Application as patently defective.² On March 23, 2009, Cutforth filed a timely Petition for Reconsideration (the "Petition"), which he supplemented on March 24, 2009.³ In order to evaluate the Petition fully, we require that Cutforth submit additional information as specified below.

Background. On June 4, 2001, Cutforth filed an application for a new AM station at Fountain, Colorado, on frequency 890 kHz, proposing 5.5 kW daytime power and 0.5 kW nighttime power, utilizing a directional antenna. The staff granted the uncontested application on July 28, 2005, specifying a construction permit expiration date of July 28, 2008. On December 31, 2007, Cutforth filed an application to modify the permitted facilities⁴ (the "2007 Modification Application"), indicating that "land use changes since the filing of the original window proposal have made it necessary to change to a new tower site and design a new directional pattern."⁵ The staff granted the modification application on February 27, 2008.

¹ File No. BNP-20010604ACD, as modified by BMP-20071231AAA and BMP-20080611ABU.

² Letter to Mr. Timothy C. Cutforth, Reference 1800B3-MFW (MB Feb. 19, 2009).

³ See March 24, 2009, Petition for Leave to File Supplement and Supplement.

⁴ File No. BMP- 20071231AAA.

⁵ 2007 Modification Application, Attachment 11, Engineering Statement at 1.

Less than two months before the DKJME(AM) construction permit was to expire, Cutforth filed another modification application (the "June 2008 Modification Application"),⁶ proposing operation with 5 kW daytime power and 0.64 kW nighttime power, requesting expedited processing. The staff granted the request and processed the June 2008 Modification Application, initially dismissing it on June 25, 2008, because of predicted nighttime interference in violation of Section 73.182 of the Commission's Rules⁷ (the "Rules") with respect to, *inter alia*, Class B Station KVOZ(AM), Del Mar Hills, Texas, and a pending application⁸ for a new AM station in Anthony, Texas.⁹ Cutforth filed a Petition for Reconsideration on July 2, 2008, attaching an amendment correcting the identified defects, and the staff granted reconsideration, reinstated the June 2008 Modification Application *nunc pro tunc*, and granted that application, as amended, on July 7, 2008 (the "July 2008 Construction Permit").¹⁰

The July 2008 Construction Permit specified a construction deadline of July 28, 2008. It also included the following conditions:

1. A license application (FCC Form 302) to cover this construction permit must be filed with the Commission pursuant to Section 73.3536 of the Rules before the permit expires on JULY 28, 2008.

2. A complete nondirectional proof of performance, in addition to a complete proof on the (day) directional antenna system, shall be submitted before program tests are authorized. The nondirectional and directional field strength measurements must be made under similar environmental conditions.

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6. Before program tests are authorized, sufficient data shall be submitted to show that adequate filters, traps and other equipment has been installed and adjusted to prevent interaction, intermodulation and/or generation of spurious radiation products which may be caused by common usage of the same antenna system by Stations KJME and KCEG (Facility ID # 135885)¹¹ and there shall be filed with the license application copies of a firm agreement entered into by the two stations involved clearly fixing the responsibility of each with regard to the installation and maintenance of such equipment. In addition, field observations shall be made to determine whether spurious emissions exist and any objectionable problems resulting therefrom shall be eliminated. Following construction,

⁶ File No. BMP-20080611ABU.

⁷ 47 C.F.R. § 73.182.

⁸ File No. BP-19850729AQ.

⁹ *Letter to Timothy C. Cutforth*, Reference 1800B2-JBS (MB Jun. 25, 2008).

¹⁰ *Letter to Timothy C. Cutforth*, Reference 1800B2-JBS (MB Jul.7, 2008).

¹¹ DKCEG(AM), Fountain Colorado, also is owned by Cutforth. We are this date sending a similar letter with respect to that Station.

and prior to authorization of program test under this grant, BOTH stations shall each measure antenna or common point resistance and submit FCC Form 302 as application notifying the return to direct measurement of power.

On August 2, 2008, five days *after* the July 2008 Construction Permit expired, Cutforth filed the Application. The Application failed to comply with Conditions 2 and 6 on the construction permit, in that it did not contain the daytime full proof of performance or the other required exhibits. Accordingly, on November 13, 2008, the staff, pursuant to Section 73.3564 of the Rules,¹² issued a deficiency letter to Cutforth identifying these defects and providing 30 days to file a curative amendment.¹³ Upon receipt of the deficiency letter, on December 11, 2008, Cutforth filed: (1) a letter requesting additional time to provide the documentation requested;¹⁴ and (2) the STA Request seeking authority to operate the station with the permitted facilities for the purpose of conducting proof of performance field strength measurements.

On February 19, 2009, the staff dismissed the Application as patently defective, declared that DKJME(AM) construction permit had expired by operation of law, deleted the call sign DKJME(AM), and dismissed the STA Request as moot.

In the Petition, Cutforth claims that the Staff “ignored the record evidence and its own precedent and incorrectly” declared Cutforth’s permit expired.¹⁵ Cutforth indicates that he has constructed the Station but ran into “unforeseen problems” which necessitated the filing of the STA to enable Cutforth to conduct the necessary proof of performance testing.¹⁶ Specifically, Cutforth describes in detail the self-denoted “sweat equity” and “other extensive efforts undertaken to construct the Station,

including successfully navigating the zoning process for towers and accessory buildings, clearing the site and digging the building and tower foundations and guy wire anchors, digging the trenches for the cables between the towers, working nights to plow ground wires into the dirt around the towers, constructing antenna tuning units for the six towers, installing modular equipment shelter and generator, placing transmitters in transmitter building along with suitable equipment racks, assembling the basic program automation equipment and testing of same, constructing reinforced tuning houses to protect against

¹² 47 C.F.R. § 73.3564.

¹³ *Letter to Timothy C. Cutforth*, Reference 1800GB2-JBS (Nov. 13, 2008).

¹⁴ *Letter to Marlene H. Dortch* (rec’d Dec. 11, 2008). In this letter, Cutforth requested an additional 209 days to complete the measurements for DKJME (and, as required by Condition # 6, for KCEG(AM). *Id.*, “Sequential Measurement Plan.” He indicated that he was issued construction permits for three AM stations (DKJME(AM) and DKCEG(AM), Fountain, Colorado, and DKJLL(AM), Pine Bluffs, Wyoming) and “ran short of time to document the operation of the facilities.” *Id.* at 3. He also described the difficulty of doing the measurements, as access along “most of the radials” is “limited” due to terrain and the presence of adjacent military installations. *Id.* at 2.

¹⁵ Petition at 9.

¹⁶ *Id.* at 8.

wildfires common in the area, and measuring the tower impedance matrix and verifying the sample line characteristics.¹⁷

Cutforth also describes the “unforeseen problems” he encountered in attempting to build the Station. He indicates that “a large fraction of the area surrounding the tower site is military or other lands with restricted access and that the adjacent Fort Carson Army Base located “near the transmitter site” is used daily for weapons practice (mortars, cannons, machine guns, tanks, etc.”¹⁸ He observes that “*if access to some military roads within the restricted area can be negotiated with base officials*, there will be a long lead time and travel will require a military escort to each measurement point each time the measurement point must be accessed.”¹⁹ He also states that weather conditions in the area “can often cause blowing snow with poor visibility and drifting which makes safe navigation difficult whether on foot or by vehicle.”²⁰ Finally, Cutforth explains another circumstance allegedly beyond his control, *i.e.*, the illness of an engineer hired to make the field strength measurements and his inability to locate a qualified replacement “under the time and financial constraints.”²¹ He argues that the staff failed to give due consideration to these circumstances.

Discussion. We are at this point unpersuaded that Cutforth’s failure to submit a timely and complete license application for DKJME(AM) was due to circumstances beyond his control rather than his own dilatory actions and poor planning. Nevertheless, provided that Cutforth demonstrates conclusively that he had completely constructed the Station by the permit expiration date of July 28, 2008, we will accord him an additional 30-day period to conduct proof of performance testing.²²

Accordingly, we request that Cutforth submit contemporaneous documentation of such construction as specified in Paragraphs 5-17 of the Cutforth Declaration submitted with the Petition. Specifically, we request that Cutforth produce copies of evidence of contact with the site owner, vendor contracts, cancelled checks, bills from equipment vendors and construction contractors, purchase orders for equipment, etc., demonstrating that the station was constructed in accordance with its construction

¹⁷ *Id.* at 2-3, referencing Declaration of Timothy Cutforth, ¶¶ 3-4, 5-18 (“Cutforth Declaration”). Cutforth declares that “the Stations’ transmitter plant has been fully constructed as of 07/28/2008 for KJME and as of 09/27/2009 [sic] for KCEG and are ready to operate in full compliance with the construction permits.” Cutforth Declaration at ¶ 3.

¹⁸ Petition at 5.

¹⁹ *Id.* We note that Cutforth does not indicate that he approached any Fort Carson Army Base official for permission to access the pertinent measurement points at any time during the DKJME(AM) three-year construction period.

²⁰ *Id.* at 6. Cutforth does not indicate that such conditions ACTUALLY delayed construction of the Station, only that such conditions “can often cause” navigation difficulties. Additionally, the DKJME construction permit as modified by the July 2008 Construction permit expired on July 28, 2008; it is unlikely that construction of the July 2008 Construction Permit was hampered by blowing snow.

²¹ *Id.*

²² In the Supplement, Cutforth indicates that, for DKJME specifically, he can complete and document measurements in 29 total days. Supplement, Amended Comprehensive Plan for Completion of Measurement and Documentation for DKJME, KCEG, and KJL. This representation begs the question of whether or not it was possible for Cutforth to complete construction and testing by the July 28, 2008, permit expiration date, because such a 29-day period would exceed the construction period remaining after grant of the July 2008 Construction Permit on July 8, 2008.

permit prior to July 28, 2008.²³ This information should be collated and indexed to the specific paragraph number in the Cutforth Declaration which the documentation is designed to support. We also request the following specific information:

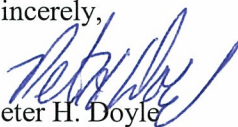
1. Photographs of the completed tower array, indicating the time and date on which they were taken.
2. The specific date(s), with supporting documentation, on which the DKJME(AM) towers were erected.²⁴
3. The results of the tower impedance matrix measurements for both the 780 kHz and 890 kHz frequencies, including the date(s) on which the measurements were taken.²⁵
4. A detailed description and contemporaneously produced documentation regarding the acquisition and installation of necessary diplexing equipment for the DKJME(AM) and KCEG(AM) antenna system.²⁶
5. A tabulation of all measurements taken prior to the July 28, 2008 construction permit expiration date, containing all data required by Section 73.186 of the Rules.

The information submitted in response to these specific inquiries should be labeled clearly and indexed to the pertinent question.

Cutforth may also produce other extrinsic evidence that he believes demonstrate the station's timely construction.

Conclusion/Action. We will withhold action on the Petition for 30 days from the date of this letter to provide Cutforth the time to assemble and submit the requested information and documentation. Failure to do so will result in the disposition of the Petition based solely on evidence currently in the record in this case.

Sincerely,


Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Mr. Timothy Cutforth

²³ Cutforth should include bills for any equipment rented (or document any other arrangement made for such equipment) to dig trenches for the cables between the towers and to "plow the ground wires into the dirt around the towers," as specified in the Cutforth Declaration at ¶ 9. If Cutforth already owned the equipment necessary to accomplish those tasks, he should describe in detail such equipment and provide the date(s) of acquisition.

²⁴ The Cutforth Declaration indicates that Cutforth hauled the tower sections to the site and cut guy wires, assembled them with the needed insulators, and "attached them to the towers in advance for the tower crew." Cutforth Declaration, ¶¶ 11-12. It does not indicate when the towers actually were erected.

²⁵ See Cutforth Declaration at ¶ 16.

²⁶ See Cutforth Declaration at ¶ 13, which discusses the transmitter and related equipment obtained and installed for DKJME(AM) and DKCEG(AM). The Cutforth Declaration makes no mention of diplexing equipment.